UNITED STATES OF AMERICA	)	
	)	MOTION FOR LEAVE TO FILE
	)	RESPONSE BRIEF TO THE
	)	GOVERNMENT'S BRIEF OF 31
	)	AUGUST 2007 AND FOR LEAVE TO
	)	PRESENT ORAL ARGUMENT AS
v.	)	*AMICUS CURIAE*
	)	
	)	Case No. 07-001
	)	Hearing Held at Guantanamo Bay, Cuba
	)	on 4 June 2007
	)	Before a Military Commission
OMAR AHMED KHADR	)	Convened by MCCO # 07-02
IN THE COURT OF MILITARY	)	Presiding Military Judge
COMMISSION REVIEW	)	Colonel Peter E. Brownback III
	)	

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSIONS REVIEW

The undersigned individuals respectfully request that the Court of Military Commissions Review allow a*mici* to file a brief in response to the Government's August 31, 2007 Reply to the Brief of *Amicus Curiae*, and that the Court hear oral argument in support of the brief filed by a*micus curiae* in the case of *United States of America v. Omar Ahmed Khadr*. These motions are combined pursuant to Court of Military Commissions Review (CMCR) Rule 20(a).

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE A RESPONSE

Pursuant to CMCR Rule 20(b), we respectfully request that this Court grant *amici*'s Motion for Leave to File a Response to the Government's Reply Brief of August 31, 2007. In its Reply Brief, the Government has asserted propositions that, without attention, may introduce error into these proceedings. In order to ensure a complete and

developed record, a*mici* request an opportunity to respond to the legal arguments put forth by the Government.

ARGUMENT IN SUPPORT OF MOTION FOR ORAL ARGUMENT

The legal issue before the Court concerns the conditions under which a captured combatant may be prosecuted by a detaining power for war crimes without the benefit of POW protections. The issues are novel – many are of first impression; they are complex; and, they are critically important. *Amici* would welcome the opportunity for the issues to be examined fully, and to respond to such concerns as the Court may wish to pose. We, therefore, respectfully request that the Court consider holding oral argument.

Respectfully submitted,

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UNITED STATES OF AMERICA	)	
	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	
	)	*AMICUS CURIAE* RESPONSE TO THE GOVERNMENT'S REPLY BRIEF OF 31 AUGUST 2007
v.	)	
	)	Case No. 07-001
	)	Hearing Held at Guantanamo Bay, Cuba on 4 June 2007
	)	Before a Military Commission Convened by MCCO # 07-02
OMAR AHMED KHADR	)	Presiding Military Judge Colonel Peter E. Brownback III

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

AMICUS CURIAE RESPONSE TO THE GOVERNMENT'S AUGUST 31 BRIEF IN REPLY TO AMICUS CURIAE

I.

The jurisdictional framework established by the MCA is internally consistent and consistent with the international law of war.

The jurisdictional provisions of the Military Commissions Act of 2006 (MCA) are premised on the rule that unlawful combatants may be tried by military commission and lawful combatants may not be tried by military commission.[1] As the MCA states,

> (a) A military commission . . . shall have jurisdiction to try … unlawful enemy combatant[s]
>
> (b) Military commissions . . . shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title.
>
> 10 U.S.C. § 948.

On that basis, the statute creates the following jurisdictional structure.

1) **An initial determination of lawful or unlawful combatant status is to be made by a competent tribunal**.

The MCA states: "A finding . . . by a [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for the purposes of jurisdiction for trial by a military commission." 10 U.S.C. § 948d(c).

That provision of the MCA is consistent with the international law of war, which requires that a captured combatant be treated as a prisoner of war (and, therefore,

[1] Because this brief is focused on the distinction between lawful and unlawful combatants, the other requirements for military court jurisdiction are not addressed herein.

excluded from trial by military commission)[2] until a combatant status determination has been made by a competent tribunal. As Article 5 of Geneva Convention III states:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy [are lawful combatants], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, art. 5, 75 U.N.T.S. 135 [hereinafter GC III].

A finding of unlawful combatancy by a competent tribunal is dispositive for establishing military commission (MC) jurisdiction under the MCA. 10 U.S.C. § 948d(c). Absent that finding by a competent tribunal, a detainee claiming POW status is presumed to be a POW and is, therefore, excluded from the lawful jurisdiction of a MC.

"The jurisdiction of a [MC] attaches upon the swearing of charges." RMC 202(c). The presumptive POW status of a detainee must, therefore, be rebutted by the contrary finding of a competent tribunal before charges for trial by military commission may be sworn.

A MC may not make the *initial* determination of unlawful combatant status that is necessary to establish MC jurisdiction. Other courts, by contrast, routinely exercise jurisdiction in order to determine their own jurisdiction – even while recognizing that the jurisdictional inquiry may result in a determination that the court has (and, in some sense, *had*) no jurisdiction over the case. A MC, however, may not proceed in that manner.

MCs are unlike other courts in this respect because of the *presumption of POW status*, which insulates potential defendants from MC jurisdiction unless and until that

[2] *See* GC III, art. 102.

presumption is rebutted. The presumption may be rebutted only through a finding of unlawful combatancy by a competent tribunal. *See* GCIII, art. 5; Protocol I, art. 45(1).

That determination by a competent tribunal is dispositive in establishing the jurisdiction of a military commission to become seized of a case. As stated in the Rules for Military Commissions:

> A finding . . . by a . . . competent tribunal . . . that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the MCA. The determination by the tribunal shall apply for purposes of [MC] jurisdiction without regard to any pending petitions for review or other appeals."

RMC 202(b).

2) Once MC jurisdiction is dispositively established through a finding of unlawful combatancy by a competent tribunal, the MC may assert jurisdiction and begin criminal proceedings, as provided by the MCA.

A military commission, as a regular part of its functions in conducting criminal proceedings, may hear motions challenging its jurisdiction over the accused. RMC 907(b)(1)(A). A motion challenging MC jurisdiction may be based upon an assertion of POW status. *See id., together with* 10 U.S.C. § 948d(c). If such an assertion is made, the MC is to adjudicate the defendant's combatant status, and then either dismiss the case for lack of jurisdiction or proceed with trial, as appropriate based on its ruling concerning the combatant status of the defendant.

Under the MCA, a MC thus retains the power, once it is seized of a case, to determine its own jurisdiction throughout the course of its proceedings. The determination of unlawful combatancy by a competent tribunal is dispositive of military commission jurisdiction in that, "the determination by the tribunal shall apply for

purposes of [MC] jurisdiction without regard to any pending petitions for review or other appeals." RMC 202(b). But the finding of the administrative tribunal is not – and could not be – dispositive of MC jurisdiction in the sense that it would divest the MC of its jurisdiction to determine its own jurisdiction. Jurisdiction to determine its own jurisdiction has long been recognized as fundamental among the necessary and inherent powers of a court. *See* Government's Brief on Behalf of Appellant, 20, citing cases from the US Supreme Court, two federal courts of appeals, the Court of Appeals for the Armed Forces, and the Air Force Court of Criminal Appeals. The Rules for Military Commissions make the point most succinctly, stating: "A military commission *always* has jurisdiction to determine whether it has jurisdiction." RMC 201(b)(3) (emphasis added).

The MCA provides two definitions of unlawful combatant status. 10 U.S.C. § 948a(1). The first articulates a substantive standard that would be applied by a MC determining its own jurisdiction. The second identifies an event that is a necessary and sufficient threshold condition for a MC lawfully to assert jurisdiction and become seized of a case. The MCA offers the two definitions disjunctively. One *or* the other definition will be applicable – either to trigger or to confirm MC jurisdiction – depending upon the phase and posture of the case.

Read in this way, the MCA's jurisdictional regime, which might otherwise seem to pose a conundrum, is perfectly logical and legally sound. The MCA *does* require, as a precondition for MC jurisdiction, a finding of unlawful combatancy by a competent tribunal, and it treats that finding as dispositive for establishing MC jurisdiction. The MCA also provides that a MC, *once seized of a case*, may hear motions challenging

jurisdiction and, if such a motion is based on a claim of POW status, conduct an adjudication of combatant status to confirm or disconfirm its own jurisdiction. There is no contradiction between these two prongs of the jurisdictional regime established by the MCA.

As Judge Brownback stated in his order of 4 June 2007,

> [I]t is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by [which the CSRT] will establish the status of a person for purposes of the MCA . . . .
>
> Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play.

By providing a two-tiered system of combatant status determination for detainees who are to be tried for crimes arising from the hostilities, the MCA ensures that only *un*lawful combatants will be tried by military commission. The MCA, in that way, safeguards the rights of POWs.

II.

The MCA, Article 45, and the Customary International Law of War

The MCA's two-tiered system is precisely consistent with the requirements of the customary international law of war. Under the law of war, if a detained combatant *who is not held as a POW* is to be tried for an offense arising out of the hostilities, he is entitled to a *judicial adjudication* of status. This feature of the law of war is embodied in Article 45(2) of Protocol I Additional to the Geneva Conventions of 1949, which states:

> If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 45, June 8, 1977, 1125 U.N.T.S. [hereinafter, Protocol I] (emphasis added).

As discussed earlier, in case of doubt as to the lawful or unlawful status of a detained combatant who claims POW status, the detainee is to be treated as a POW until his status has been determined by a competent tribunal. *See* GC III, art. 5; Protocol I, art 45. *See also, infra* at pp. 9-11. Therefore, a detainee who claims POW status may be held as a *non*-POW only if a competent tribunal had already found him to be an unlawful combatant. Consequently, the person who "is not held as a POW and is to be tried for an offense" and who, therefore, has "the right to [a status adjudication]," is, necessarily, a person who has *already* been found, by a competent tribunal, to be an unlawful combatant.

The Government argues in its Reply Brief that the law embodied in Article 45 of Protocol I is irrelevant to the interpretation of the MCA. Reply Brief at 3. While Protocol I has not been ratified by the US, the provisions of Article 45 constitute customary international law, and have been explicitly endorsed as such by the United States, as discussed below.

Customary international law is highly relevant to interpretation of the MCA. The Supreme Court has stated clearly and consistently that, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

The Supreme Court has observed repeatedly that, where a statute is ambiguous, it should be interpreted in a manner consistent with the obligations of the US under

international law. *See* Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); C*f.* McCulloch v. Sociedad Nacional de Marinos de Honduras, 372 U.S. 10 (1963). The jurisdictional provisions of the MCA are, at least on first reading, ambiguous. The Government itself, in its Reply Brief, comments on "the confusion about the jurisdictional provisions of the MCA." Reply Brief at 3. Centuries of Supreme Court precedent require that ambiguous provisions be interpreted consistently with customary international law, if possible.

The Amicus Brief, in illustrating that Article 45 reflects customary international law and has been endorsed as such by the United States, quotes the 1987 statements of Abe Sofaer and Michael Matheson, then-Legal Adviser and Deputy Legal Adviser, respectively, US Department of State. The Government seeks, incorrectly, to characterize those statements as, "the isolated remarks of former officials [that] do not amount to binding declarations as to what is customary international law." Reply Brief at 4. In the statements quoted, the State Department Legal Adviser and Deputy Legal Adviser are speaking in their official capacities, on behalf of the United States.

Mr. Matheson began his remarks on the occasion in question by explaining their significance and placing them in context. He said:

> I appreciate the opportunity to offer this . . . presentation on the United States position concerning the relation of customary international law to the 1977 Protocols . . . . The executive branch has . . . recommend[ed] that . . . Protocol I . . . not be submitted to the Senate . . . .
>
> [S]everal important facts flow from this situation. First, the United States will consider itself bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future . . . .
>
> With that background, let me then review the principles the we believe should be observed . . . .

Michael Matheson, *The US Position on the Relation of Customary International Law to the 1977 Protocols*. 2 AM. U. J. INT'L L. & POL'Y 419, 420, 422.

Mr. Matheson then described the position of the US on the status, under customary international law, of the various provisions of Protocol I. Concerrning Article 45, he stated:

> We [the United States] support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a [POW] and is to be tried for an offense arising out of the hostilities, he should have a right to assert his entitlement to [POW] status before a judicial tribunal and to have that question adjudicated. Those principles are found in article 45.

Matheson at 425-26.

That is the unequivocal statement of the official US position on Article 45.

The Government suggests in its Reply Brief that, rather than endorsing Article 45 as customary international law, Mr. Matheson in fact "*affirmatively disclaimed* the 'customary' legal effect of article 45." Reply Brief at 4. The Government quotes Mr. Matheson as saying:

> [W]e support the principle that persons entitled to combatant status be treated as [POW] in accordance with [GC III], as well as the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations. Those statements are, of course, related to but different from the content of article[] . . . 45 . . . .

The Government's use of that quotation reflects a point of confusion. That confusion arises from an error (probably, typographical) in the text of Matheson's remarks as published.

To resolve that confusion we must look at the full quotation, without ellipses. Picking up where the Government's quotation leaves off, the statement reads as follows.

> . . . related to but different from the content of articles *44 and* 45, which relax the requirements of the Fourth Geneva Convention concerning prisoner-of-war

> treatment for irregulars, and, in particular, include a special dispensation allowing individuals who are said to be unable to observe this rule in some circumstances to retain combatant status, if they carry their arms opening during engagements and deployments preceding the launching of attacks.
>
> On the other hand, we do [*at this point we pick up Matheson's statement about article 45, quoted above]* support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a [POW] and is to be tried for an offense arising out of the hostilities, he should have a right to assert his entitlement to [POW] status before a judicial tribunal and to have that question adjudicated. Those principles are found in article 45.

Matheson at 425-26 (emphasis added).

Those two paragraphs of Matheson's statement, as reproduced in the published text, are contradictory: The first says that the US rejects the provisions of Article 45, and the second says that the US supports the provisions of Article 45. The contradiction was caused by the erroneous inclusion of the words "and 45" in the first paragraph of the quotation. The *amici* have ascertained through two means that the reference to Article 45 in the first paragraph was inserted in error.

The first is simply a reading of Articles 44 and 45. Article 45 contains nothing that "relax[es] the requirements . . . concerning prisoner-of-war treatment for irregulars" or that "allow[s] individuals who are said to be unable to . . . distinguish themselves from the civilian populations in some circumstances to retain combatant status." Article 45, in fact, contains nothing relating to the requirements for prisoner-of-war status.[3] In other words, the reference to Article 45 in the first paragraph quoted just makes no sense.

By contrast, Article 44, which is also cited in the first paragraph of the quote, consists of eight paragraphs defining the requirements for prison-of-war status, including

[3] *See* Article 45 (concerning *procedures* for combatant status determinations).

several that relax the requirements concerning prisoner-of-war treatment for irregulars.[4] Subsection 3 of Article 44, in particular, states: "[W]here . . . an armed combatant cannot so distinguish himself [from the civilian population], he shall retain his status as a combatant . . . ."

The logical conclusion is that only Article 44, and not Article 45, was supposed to be included in the first paragraph. This conclusion is borne out by another aspect of the first paragraph of the Matheson quotation. Matheson states that "the executive branch regards *this provision* as highly undesirable . . . ." Matheson apparently intended to refer to *one* article ("this provision"), not two, in the first paragraph.

Further, in order to be completely sure, we raised the point with the relevant officials, who confirmed that the reference to Article 45 in the first paragraph of the quotation was unintended.

In sum, the provisions of Article 45 – articulating the presumption of POW status and the right to a status adjudication – are a part of the customary international law of war, and have been endorsed as such by the United States, explicitly and forcefully, in recognition of and to prevent repetition of the ordeal of US service members summarily convicted as war criminal in North Vietnam.

III.
The Legislative History

In the MCA, Congress drew a sharp distinction between lawful and unlawful enemy combatants, excluding the lawful from trial by military commission. The Amicus Brief notes that, in enacting the MCA, Congress rejected an earlier bill that did not draw

[4] *See* Article 44.

that distinction but, rather, contemplated MC jurisdiction over "any individual . . . detained as an enemy combatant." Amicus Brief at 9.

The Government's Reply Brief correctly observes that, "[amici believe] that Congress intended the term 'unlawful enemy combatant' to be narrower than the universe of 'enemy combatants'." Reply Brief at 2. Indeed, amici view as a logical impossibility that the category of "unlawful enemy combatants" would designate a group *broader* than "the universe of enemy combatants." Nevertheless, the Government contends that, "[t]he exact opposite is true . . . . To the extent there is any difference between the two terms, the Act's legislative history suggests that Congress intended 'unlawful enemy combatant' to be *broader* than 'enemy combatant' as defined under the original bill."

In seeking to support that assertion, the Government notes that Senator Warner used the word "expanded" in connection with the phrase "unlawful enemy combatant" in the course of floor debate on the MCA. Focusing on that use of the word "expanded," the Government quotes Senator's Warner's statement:

> We expanded this definition of "unlawful enemy combatant" when we went from the committee bill to [the MCA as adopted] . . . . It was pointed out to us that perhaps our bill is drawn so narrowly that we would not be able to get evidence and support convictions from those who are involved in hiding in the safe houses, wherever they are in the world, including here in the United States.

152 Cong. Rec. S10250 (Sept. 27, 2006).

Senator Lindsey Graham, to whom Senator Warner ceded the remainder of his time on the occasion in question, further clarified the expansion of the definition of "unlawful enemy combatant" that was under discussion. As Senator Graham stated,

> The enemy combatant definition that is changed from the compromise and committee bill allows us to . . . try those people who intentionally and

> knowingly aid terrorism, materially support terrorism . . . . I am glad we expanded the definition because those who are assisting terrorists in a knowingly purposeful way should be held accountable for their actions.

Id.

Obviously, not every expansion of the definition of "unlawful enemy combatant" would expand the term to cover *all* enemy combatants. Senators Warner and Graham note that they expanded the definition of "unlawful enemy combatant" to include those who aid or materially support terrorism, including those who may be hiding in safe houses. Nothing in the floor debate cited by the Government suggests that Congress expanded the definition of "unlawful enemy combatant" to be broader than – or to be equivalent to – the universe of "enemy combatants."

IV.

Conclusion

Congress, in enacting the MCA, designed a two-tiered jurisdictional system that safeguards the rights of POWs. In so doing, Congress took care to protect the well being of US service men and women who may be captured by enemy forces in the future. This Court is now called upon to give effect to the protections that Congress put in place.